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Supreme Court of the United States

October Term, 1964.

No.

292

THE ATLANTIC REFINING COMPANY,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX.

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTE INVOLVED	3
STATEMENT OF THE CASE	4
I. Basic Facts	4
II. Proceedings Before the Commission	5
III. Review by the Court of Appeals	8
IV. Companion Cases	9
REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT	11
I. The Case Presents Important Questions Which Should Be Settled by This Court	11
A. Is the Sales Commission Method of Distributing TBA an Unfair Method of Competition?	11
B. May the Commission, Under Section 5 of the Fed- eral Trade Commission Act, Outlaw a Method of Competition Because of Its Competitive Effects Without Meeting the Standards of Market Signifi- cance Established by This Court Under the Anti- trust Laws?	12
C. Is the Commission's Order Illogical and Inappro- priate in That, Having Specifically Preserved Atlantic's Right to Distribute TBA, It Prevents Atlantic From Using the Method of Distribution Which Atlantic Has Found Most Advantageous for Itself and Its Dealers?	17
D. May the Commission Outlaw All Sales Commis- sion Contracts on the Basis of the Competitive Effects of a Particular Contract Between the Indi- vidual Respondents?	20

INDEX (Continued).

	Page
II. The Decisions Below Are in Conflict With Decisions of This Court	21
A. In Contravention of the <i>White Motor</i> Decision, the Court of Appeals Affirmed the Commission's Creation of a New Category of <i>Per Se</i> Violation Without Considering the Business Justifications Involved	21
B. In Contravention of the <i>Chenery</i> Decisions, the Court of Appeals Invoked a New Ground for Affirming the Commission	23
CONCLUSION	25
APPENDIX A—Opinion of USCA(7)	1a
APPENDIX B—Order of USCA(7)	20a
APPENDIX C—Final Decree of USCA(7) Affirming and Enforcing Order to Cease and Desist	21a

TABLE OF CASES CITED.

	Page
Asheville Tobacco Board of Trade, Inc. v. Federal Trade Commission, 263 F. 2d 502 (4th Cir. 1959)	15
Brown Shoe Co. v. United States, 370 U. S. 294 (1962)	14
Federal Trade Commission v. Gratz, 253 U. S. 421 (1920)	15
Federal Trade Commission v. Motion Picture Advertising Service Co., 344 U. S. 392 (1953)	15
Federal Trade Commission v. Raladam Co., 283 U. S. 643 (1931)	15
Federal Trade Commission v. Ruberoid Co., 343 U. S. 470 (1952)	21
Firestone Tire & Rubber Co., 58 F. T. C. 371 (1961)	9
B. F. Goodrich Co. and The Texas Co., F. T. C. Docket No. 6485, Order to Cease and Desist April 15, 1963	9
NLRB v. Mackay Radio & Telegraph Co., 304 U. S. 333 (1938) ..	18
Northern Pacific Ry. v. United States, 356 U. S. 1 (1958) ...	7, 21
Osborn v. Sinclair Refining Co., 286 F. 2d 832 (4th Cir. 1960), cert. denied, 366 U. S. 963 (1961)	7, 9
SEC v. Chenery Corporation, 318 U. S. 80 (1943), 332 U. S. 194 (1947)	23, 24
Standard Oil Co. of New Jersey v. United States, 221 U. S. 1 (1911)	14
Tampa Electric Co. v. Nashville Coal Co., 365 U. S. 320 (1961) ..	15
United States v. American Tobacco Co., 221 U. S. 106 (1911) ..	14
United States v. Continental Can Co., 32 U. S. L. Week 4642, June 22, 1964	14
United States v. Standard Oil Co. of California, 1959 Trade Cases ¶ 69,399 (S. D. Cal. 1959)	9
White Motor Co. v. United States, 372 U. S. 253 (1963)	21, 23

MISCELLANEOUS.

Page

Oppenheim, Guides to Harmonizing Section 5 of The Federal Trade Commission Act With the Sherman and Clayton Acts, 59 Mich. L. Rev. 821 (1961)	16
Report of the Attorney General's National Committee to Study the Antitrust Laws, March 31, 1955	15, 16

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No. _____

THE ATLANTIC REFINING COMPANY,
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v.

FEDERAL TRADE COMMISSION,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT.**

The Atlantic Refining Company ("Atlantic") prays that a Writ of Certiorari issue to review an order and decree of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW.

There are three opinions below: namely, the Initial Decision of the Hearing Examiner of the Federal Trade Commission, filed on October 23, 1959; the Opinion of the Commission on appeal from the Hearing Examiner, filed on March 9, 1961; and the Opinion of the Court of Appeals on petition for review of the Commission's order, filed on April 24, 1964.

The Initial Decision of the Examiner (41)¹ and the Opinion of the Commission (61) are reported at 58 F. T. C. 309 (1961). The Opinion of the Court of Appeals is printed in Appendix A, *infra*, page 1a, and is reported at 331 F. 2d 394.

1. This and similar references are to page numbers of the Joint Appendix filed with the Court of Appeals.

JURISDICTION.

The Order of the Court of Appeals was entered on April 24, 1964 and is printed in Appendix B, *infra*, page 20a. The Final Decree of the Court of Appeals was entered on May 20, 1964 and is printed in Appendix C, *infra*, page 22a. Petitioner invokes the jurisdiction of this Court under Section 1254(1) of the Judicial Code.

QUESTIONS PRESENTED.

The Atlantic Refining Company ("Atlantic"), a gasoline marketer, has a contract with Goodyear Tire & Rubber Company ("Goodyear") under which Atlantic has agreed, in return for a commission, to act as sales representative for Goodyear in the sale of Goodyear tires, batteries and accessories ("TBA") to Atlantic gasoline dealers, and to assist those dealers in selling the TBA to the motoring public. This contract was challenged by the Federal Trade Commission as an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act.

The Commission has entered an order prohibiting Atlantic from continuing its arrangement with Goodyear and, in addition, from having such an arrangement with any other TBA supplier. From the Commission's opinion it appears that the basis for the order is the supposed anti-competitive effects of the contract.

On appeal, the Court of Appeals affirmed the Commission and held the contract, by reason of Atlantic's relationship with its dealers, to be an illegal tying agreement. The Court attributed the same theory to the Commission.

The general question presented is whether the Court of Appeals erred in affirming the Commission's decision that the Atlantic-Goodyear contract is an unfair method of competition. If, as seems clear from the Commission's opinion, the actual basis of the Commission's decision was the sup-

posedly anticompetitive effects of the Atlantic-Goodyear contract, the Court of Appeals erred in adopting a different ground, and the following questions are presented by the Commission's order:

Did the Commission (and the Court of Appeals, in affirming) err when—

(a) the Commission, in finding a violation of Section 5 of the Federal Trade Commission Act, failed to meet the standards of market significance which would be applicable in analogous cases under the antitrust laws;

(b) the Commission's order, while preserving Atlantic's right to distribute TBA, requires Atlantic to discontinue the method of distribution which is most advantageous to its dealers;

(c) the Commission's order, though based on the competitive effects of a particular contract, prohibits all similar arrangements regardless of differences which might change the competitive effects; and

(d) the Commission's order, in effect, creates a new *per se* violation of the antitrust laws without consideration of the business justifications for the prohibited practices.

STATUTE INVOLVED.

The statute involved is Section 5(a)(1) of the Federal Trade Commission Act, 15 U. S. C. § 45(a)(1), which reads in full as follows:

"Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."

*Petition for Writ of Certiorari***STATEMENT OF THE CASE.****I. Basic Facts.**

Atlantic markets gasoline under the "Atlantic" brand along the Eastern Seaboard. Its principal customers are independent retail dealers operating service stations under leases or supply contracts.

The handling of tires, batteries and accessories is essential to successful service station operation, and every major oil company offers a TBA program to its dealers. Some of these companies purchase TBA and resell it to the dealers, this type of program being known as "purchase-resale." Other oil companies do not take title to the TBA, but act as sales representative in the sale from the TBA supplier to the dealers. This type of program is known as "sales commission." Under purchase-resale, distribution facilities are generally the responsibility of the oil company. Under sales commission, the facilities are the responsibility of the TBA supplier.

Atlantic, like its competitors, has offered a TBA program since the 1920's. For many years Atlantic operated on the purchase-resale basis. However, its purchase-resale program proved unsatisfactory to Atlantic dealers, primarily because Atlantic was unable to provide adequate distribution facilities and services. Consequently, in 1951 Atlantic made a sales commission arrangement with Goodyear.²

The adoption of the sales commission plan solved Atlantic's distribution problems because, under the plan, certain Goodyear outlets are available as supply points for Atlantic dealers.

2. Concurrently, Atlantic made a similar arrangement with The Firestone Tire & Rubber Company. Atlantic elected to sell Goodyear in part of its marketing area, and Firestone in the remainder. Firestone was not made a party to this proceeding; but the legality of the Firestone contract was challenged in the complaint.

II. Proceedings Before the Commission.

In January 1956, the Federal Trade Commission issued a complaint against Atlantic and Goodyear, charging that their sales commission contract is an unfair method of competition. The complaint alleged that Atlantic has inherent control over its dealers which it exercises in favor of Goodyear, and that this adversely affects competition because other TBA wholesalers are unable to sell to Atlantic dealers (5).

After extensive hearings, the Commission's Examiner upheld the legality of the sales commission contract and dismissed the complaint as to Goodyear. The Examiner entered Conclusions finding, *inter alia*, that there is no conspiracy between Atlantic and Goodyear to restrain the sale and distribution of TBA; that neither the sales commission contract nor Atlantic's contractual arrangements with its dealers require them to purchase Goodyear TBA; and that Atlantic's commission is based on substantial services rendered by Atlantic to Goodyear. The Examiner rejected any inference or implication from Atlantic's contractual relationships with its dealers that Atlantic controls the dealers' TBA purchases; and he held that the Atlantic-Goodyear contract is not illegal (57-9).

However, the Examiner also found that Atlantic salesmen have, on occasion, intimidated dealers and forced them to purchase Goodyear TBA. Accordingly, he entered an initial order against Atlantic prohibiting such coercion (41).

Both sides appealed to the Commission. Atlantic contested the factual basis for the Examiner's finding regarding coercion, and also contended that the coercive acts so found were too isolated to support an order against the Company. The Commission's Staff, on the other hand, disputed the Examiner's finding that Atlantic does not control its dealers; argued that Atlantic's position alone, without coercion, causes dealers to buy substantial quantities of Goodyear TBA; and sought an extreme order which would prohibit Atlantic from selling TBA at all.

Otherwise, argued the Staff, "the mere inhibition of the sales commission plan without more can be easily circumvented by the use of other TBA marketing plans by respondents, such as the Lee-Exide TBA purchase-resale plan used by Atlantic prior to its adoption of the sales commission plan, which would again have the same adverse competitive effects".³

The Commission sustained the Examiner on the issue of coercion. [While Atlantic again contested this point before the Court of Appeals, it no longer does, so that the issue of coercion is now out of the case.]

On the broader issue, the Commission reversed the Examiner and held the sales commission contract illegal. The Commission refused, however, to grant the full relief sought by its Staff, i.e., it refused to prohibit all TBA selling by Atlantic. The Commission's order only prevents Atlantic from selling TBA to Atlantic dealers on behalf of persons other than itself; it permits Atlantic to return to purchase-resale.⁴

Thus, the unfairness of Atlantic's activities is made to depend on the narrow distinction between selling for Atlantic's account (legal), and selling for another's account (illegal). Atlantic's right to offer a TBA program to its dealers is preserved, but Atlantic is forced to exercise this right in a manner which its experience has shown to be uneconomic.

In its opinion, the Commission said that the coercion by Atlantic salesmen with respect to TBA resulted in implied tie-in agreements which were unlawful under this

3. Staff Br. to Commission 104.

4. The Commission's order is in two parts, reflecting the two issues which had developed in the case. The first four paragraphs deal with the issue of sales commission and prohibit all sales commission contracts between Atlantic and any supplier of tires, batteries, or accessories. The last two paragraphs deal with the issue of coercion and prohibit Atlantic from forcing its dealers to purchase sponsored TBA or refrain from purchasing non-sponsored TBA (131).

Court's decision in *Northern Pacific Ry. v. United States*,⁵ and the decision of the Court of Appeals for the Fourth Circuit in *Osborn v. Sinclair Refining Co.* (122-4).⁶

This being only a subsidiary question,⁷ the Commission turned to what it called the "issue here," the legality of a "particular method" of TBA distribution. It agreed with the Staff's theory that Atlantic has the power to cause Atlantic dealers to purchase substantial Goodyear TBA without coercion, but said that "this power is a fact existing independently of the particular method of distributing" used by Atlantic.

"Determination of illegality in this context," said the Commission, "requires an evaluation of competitive effects resulting from the sales commission method of distributing TBA" (124).

The Commission's opinion then proceeded to describe the supposed effects of the sales commission plan which the Commission considered anticompetitive. Most of these effects relate to the alleged "foreclosure" of competing wholesalers from doing business with Atlantic dealers and would therefore be present under purchase-resale to the same extent as under sales commission. However, the Commission identified two effects which it considered unique to sales commission: (a) the supposed competitive advantage conferred upon Goodyear supply points; and (b) the supposed competitive disadvantage of small tire companies which cannot offer an extensive distribution system in competition with Goodyear (126 *et seq.*)

In making its "evaluation of competitive effects," the Commission was content to rest on generalities. No effort

5. 356 U. S. 1 (1958).

6. 286 F. 2d 832 (4th Cir. 1960), *cert. denied*, 366 U. S. 963 (1961).

7. Earlier in its opinion the Commission said that, although the "more dramatic and immediate" impact is upon *dealers*, it is "the competitive effects of the sales commission system on *competitors of Goodyear* . . . which raise the most grave questions in this proceeding." (100, emphasis added.)

was made to measure the "foreclosure" against any relevant market at any level. Indeed, no relevant market was specified.

The Commission's order is not confined to the immediate parties or facts of the proceeding. It prohibits Atlantic from having a sales commission arrangement with any supplier of tires, batteries or accessories regardless of whether or not the same competitive effects would be present. The order against Goodyear similarly prevents Goodyear from having a sales commission arrangement with any oil company.⁸

The Commission received no evidence and made no findings in support of the scope of its order. No reason is advanced to justify banning all sales commission plans.

III. Review by the Court of Appeals.

In affirming the Commission's order, the Court of Appeals took a different tack. The Court said that although admittedly the sales commission contract between Atlantic and Goodyear "has no tying features," the contract becomes an illegal tying arrangement when considered "contextually" with the Atlantic-dealer relationship (*infra*, 16a). It attributed this same tying rationale to the Commission, saying that the Commission had "in effect" so found, apparently because the Commission cited tying cases in its discussion of coercion (*infra*, 12a).

Since the Court of Appeals considered that the case involves a tying practice which would be *per se* illegal, it did not reach the question whether the Commission had erred in failing to measure the alleged anticompetitive effects of the contract against any relevant market.

The attempt by the Court of Appeals to read a tying theory into the Commission's opinion ignores two facts:

8. The order against Goodyear was also affirmed by the Court of Appeals, and we are advised that Goodyear intends to file a petition for writ of certiorari.

1. The tying proposition is a simple one. If the Commission had intended to rely on it, the Commission would have said so. It would not have insisted that the case depends on an evaluation of competitive effects, nor would it have devoted such a substantial portion of its opinion to that evaluation.

2. The tying proposition must start with the premise that, even without coercion, any selling of TBA by Atlantic is, *ipso facto*, illegal tying. But this is precisely what the Commission refused to say.⁹ Despite the Staff's request for a prohibition against all selling, the Commission's order preserves Atlantic's right to sell and promote TBA to dealers under purchase-resale. If there is no illegal tying when Atlantic sells for its own account under purchase-resale, there cannot be any illegal tying when it sells for Goodyear's account under sales commission.

IV. Companion Cases.¹⁰

Contemporaneously with the filing of this case against Atlantic and Goodyear, the Commission also instituted identical proceedings with respect to sales commission agreements between The Firestone Tire & Rubber Company and Shell Oil Company,¹⁰ and between The B. F. Goodrich Company and The Texas Company.¹¹ Broad orders have been issued against those companies forbidding their use of sales commission plans under any circumstances.

9. Every court having occasion to consider the question has recognized and preserved an oil company's freedom to sell TBA, provided it does not coerce. See *Osborn v. Sinclair Refining Co.*, 286 F. 2d 832, 836 (4th Cir. 1960); and consent decree in *United States v. Standard Oil Co. of California*, 1959 Trade Cases ¶ 69,399 (S. D. Cal. 1959). Any tying is cured by the paragraphs of the order which prohibit coercion.

10. 58 F. T. C. 371 (1961).

11. F. T. C. Docket No. 6485, Order to Cease and Desist April 15, 1963.

The order against Goodyear in the present case outlaws twelve Goodyear contracts with non-respondent oil companies of varying sizes in many different marketing areas. The orders in the other proceedings likewise blanket numerous other oil companies and TBA suppliers, large and small, throughout the United States. The Commission has no regard for the kaleidoscopic competitive situation involved; its attitude is that no sales commission plan can ever be lawful in this industry. The practical effect is to legislate sales commission distribution out of the petroleum industry, and require all oil companies to adopt purchase-resale distribution or abandon their TBA programs.

The Firestone-Shell and Goodrich-Texas cases are now pending before the Courts of Appeals for the Fifth Circuit and District of Columbia Circuit, respectively.

**REASONS RELIED ON FOR THE
ALLOWANCE OF THE WRIT.**

**I. The Case Presents Important Questions Which Should
Be Settled by This Court.**

The impact of this case and the companion cases is not limited to the parties or the circumstances. It affects major segments of the petroleum industry, including all the oil companies and TBA suppliers now distributing through the sales commission method. It affects thousands of gasoline dealers and hundreds of supply points, as well as the motoring public. The sweep of the orders is so broad that henceforth no oil company, regardless of its relationship with its dealers, can safely enter into a sales commission plan with any supplier of tires, or of batteries, or of any accessory.

The fundamental question is:

**A. Is the Sales Commission Method of Distributing TBA an
Unfair Method of Competition?**

Because of the long standing, industry-wide acceptance of the sales commission method, and the large number of oil companies, gasoline dealers and TBA supply points whose business has been built upon this method, the broad question of its legality should be settled by this Court. This question alone justifies review.

If the Court of Appeals were correct in its view that the Commission found the sales commission method to be "in effect" a tying arrangement (a view which, as indicated above, we believe to be incorrect), an important subsidiary question would be presented: namely, whether a sales commission contract becomes a tying agreement because the salesman is already supplying other goods and facilities to his customers under short term leases and supply contracts. The answer would have important implications for every manufacturer who distributes branded merchandise through franchised dealers.

In this connection, it should be noted that, as a matter of policy, Atlantic did not condone tying. Atlantic's policy was that dealers were free to buy TBA of their choice from suppliers of their choice.¹² Despite the Court of Appeals' discussion of coercive practices in violation of this policy, we believe that the Court, in the last analysis, based its conclusion that this is a tying case on the mere existence of Atlantic's position, of which it said the lease and supply agreements, "with their short term and cancellation provisions," are the "keystone" (*infra*, 13a).

However, we have already demonstrated that the Commission did not consider this a tying case. Consequently, we turn to the important subsidiary questions actually posed by the Commission's opinion and order. They are:

B. May the Commission, Under Section 5 of the Federal Trade Commission Act, Outlaw a Method of Competition Because of Its Competitive Effects Without Meeting the Standards of Market Significance Established by This Court Under the Antitrust Laws?

This question arises out of the Commission's failure to relate the competitive effects on which it relies to any relevant market. The Commission says, in essence, that a portion of the Atlantic dealers' TBA purchases is "foreclosed" by Atlantic's power over its dealers; that under the Goodyear-Atlantic agreement Goodyear acquires these sales for its supply points; and that this benefits the supply points and Goodyear and hurts their competitors. But the Commission never attempts to measure the extent of the benefit or the burden by any recognized legal criteria. For example—

¹² Atlantic advised its dealers in writing that acceptance or rejection of Atlantic's TBA program is a matter of the dealer's choice (CX 150). It instructed its salesmen in writing that dealers were not to be made to feel they must buy the program just because they are Atlantic dealers (CX 149). It advised its dealers in writing to report violations of these instructions (CX 207). It followed up these written statements of policy with oral presentations at dealer meetings attended by dealers and salesmen.

1. As to the extent of the "foreclosure," the record shows that Atlantic dealers have purchased annually about \$6,000,000 of Goodyear TBA under the Atlantic program in recent years. But the record is silent on whether this represents 100% or 1% of their purchases of all TBA.

2. With respect to the Goodyear supply points, the record does not indicate their share of the total TBA market or the share of their business represented by sales to Atlantic dealers under Atlantic's program.

3. As for Goodyear's competitors, there is no evidence of Goodyear's share of the total TBA market,¹³ although it is stated that Goodyear is the largest manufacturer of rubber products in the United States. There is no evidence that competitors of Goodyear do not have adequate outlets for their TBA. There is no evidence as to the relative use of the sales commission method and the purchase-resale method by Goodyear's competitors and Atlantic's competitors, nor of any industry trend towards one method or the other.

4. There is no evidence concerning the competition encountered by Atlantic dealers from mail order stores, discount houses, department stores and other aggressive TBA marketers. Atlantic showed that the Atlantic dealers' ability to compete depends in large measure on the quality of Atlantic's TBA program, including the method of TBA distribution.

The foregoing cannot be oversight. It is clear, although the Commission did not say as much, that the Commission did not feel required to measure the competi-

13. The only evidence of the market for TBA generally relates to the national market, which is approximately four billion dollars annually.

tive effects against any market and made no attempt to do so.

It is equally clear that in an analogous proceeding under the Sherman Act or the Clayton Act, a measurement of the competitive effects against the relevant market would be required.¹⁴ It is elementary that a contract is not an illegal restraint unless it is significant to the market. That is the test under Sections 1 and 2 of the Sherman Act. *Standard Oil Co. of New Jersey v. United States*, 221 U. S. 1 (1911); *United States v. American Tobacco Co.*, 221 U. S. 106 (1911). It is also the test under Section 7 of the Clayton Act:

"Market shares are the primary indicia of market power The merger must be viewed functionally in the context of the particular market involved, its structure, history and probable future." *United States v. Continental Can Co.*, 32 U. S. L. Week 4642, 4646 (June 22, 1964).¹⁵

It is also the test under Section 3 of the Clayton Act:

"To determine substantiality in a given case, it is necessary to weigh the probable effect of the contract

14. The case could not involve a violation of Section 3 of the Clayton Act, because the Atlantic-Goodyear contract does not involve a lease or sale; nor could it involve a violation of Section 7, because there is no merger or acquisition of stock or assets. However, both the Commission and the Court of Appeals spoke generally in Clayton Act terms. They said that the Atlantic-Goodyear contract results in an "integration" of Atlantic's power over its dealers into Goodyear's distribution system, thus "likening the contract to an acquisition or merger. Atlantic has always contended that the merger analogy overstates the facts and that the proper measure of legality is Section 1 of the Sherman Act.

There are also inferences in the Commission's frequent references to "foreclosure" that the sales commission plan should be likened to exclusive dealing.

15. As this Court said in *Brown Shoe Co. v. United States*, 370 U. S. 294, 343 (1962): "The market share which companies may control by merging is one of the most important factors to be considered when determining the probable effects of the combination on effective competition in the relevant market."

on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein. It follows that a mere showing that the contract itself involves a substantial number of dollars is ordinarily of little consequence." *Tampa Electric Co. v. Nashville Coal Co.*, 365 U. S. 320, 329 (1961).

Thus, the Commission's failure to meet normal anti-trust standards is apparent and virtually admitted. The question is: was it required to do so when proceeding under Section 5?

Although the question has not yet been squarely decided, Atlantic believes that a fair reading of this Court's opinions construing Section 5 leads to an affirmative answer. *Federal Trade Commission v. Gratz*, 253 U. S. 421 (1920); *Federal Trade Commission v. Motion Picture Advertising Service Co.*, 344 U. S. 392, 395 (1953); and *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643, 647 (1931), all indicate that where a method of competition is challenged on the ground that it is anticompetitive, normal antitrust standards prevail.

The Court of Appeals for the Fourth Circuit adopted this view in reviewing a Section 5 proceeding, saying:

"... Every restraint of trade is not a violation of the antitrust laws; the decisive question is whether it is an unreasonable restraint, and this depends on the significance of the restraint in relation to the particular market under investigation." *Asheville Tobacco Board of Trade, Inc. v. Federal Trade Commission*, 263 F. 2d 502, 511 (4th Cir. 1959).

The Attorney General's National Committee to Study the Antitrust Laws was of the same view. It said that

"proceedings thus brought under Section 5 ought not, in our opinion, circumvent the essential criteria of illegality prescribed by the express provisions of the Clayton Act" (Report of the Committee, p. 149). The same view has been taken by eminent authority.¹⁶

We appreciate the contention of the Commission that it must have broad powers to deal with practices outside the technical confines of other antitrust statutes, particularly in the case of incipient offenses. But this is not an incipency case. When these proceedings were instituted, the sales commission plan had been used by Atlantic for five years and by other oil companies for decades. There had been ample opportunity for the effects of sales commission plans to manifest themselves. The Commission could, for example, have examined the percentage of Atlantic dealers' TBA purchases made under the plan to see whether it was increasing or decreasing. Or the Commission could have examined the shares of all oil company dealers' TBA purchases under all sales commission plans in a given market over a given period. But it chose to ignore these objective measures and to rely entirely on characterization.

The Commission will no doubt also argue that it need not "mathematically measure" any market shares. This misses the point. We are talking of a more fundamental requirement: that when an order in an antitrust case seeks justification in competitive effects, there must be *some* area of competition (the relevant market) in relation to which the effects are to be measured. And there must be

16. In the area of Sherman Act offenses, "harmonization of the Commission's exercise of section 5 jurisdiction requires the Commission to be held to the same substantive criteria as those established by judicial interpretations of the Sherman Act." Also, "Section 5 should impose upon the Commission the same burden of proof as the particular Clayton Act provision covering the 'economically equivalent' anticompetitive transaction or practice." Oppenheim, *Guides to Harmonizing Section 5 of The Federal Trade Commission Act with the Sherman and Clayton Acts*, 59 Mich. L. Rev. 821, 826, 836 (1961).

some measure to show the relationship between the effects and competition within the market. This is not a case of proof falling somewhat short of Sherman or Clayton Act standards. This is a case of no proof at all.

If the Commission is authorized by Section 5 of the Federal Trade Commission Act to enter sweeping orders affecting broad segments of American industry, it should be required to compile a record and an analysis showing the actual state of the market, the evils sought to be corrected, and the results to be anticipated from the order.

Ironically, if the Commission were to make such an investigation today, it might well find that the one significant market trend which was established by the record in 1956 has subsequently reversed itself. Both the Commission (65) and the Court of Appeals (*infra*, 18a) noted that service stations generally then constituted a large and increasingly important market for TBA. Trade surveys in more recent years indicate that service station operators have been falling behind in their competitive race with discount houses, mail order stores and department stores—as evidenced by a declining share of replacement tires passing through service stations. This makes it all the more important for service station operators to have the best possible TBA distribution system.

C. Is the Commission's Order Illogical and Inappropriate in That, Having Specifically Preserved Atlantic's Right to Distribute TBA, It Prevents Atlantic From Using the Method of Distribution Which Atlantic Has Found Most Advantageous for Itself and Its Dealers?

Atlantic dealers buy Goodyear TBA under the Atlantic program for many reasons. The merchandise is of excellent quality; the brand is well and favorably known to the motoring public; Atlantic provides technical training and product information not available from others; Atlantic also provides sales promotion assistance through display materials and promotional "events" to attract the motor-

ists to Atlantic stations in preference to discount houses, mail order stores and like competitors; Atlantic dealers have confidence in Atlantic's recommendations; and, finally, the program provides quick delivery from a convenient source—the Goodyear supply point. By requiring Atlantic to discontinue its sales commission arrangement with Goodyear, the Commission seeks to change none of the foregoing except the convenient source of supply. Thus the question is whether it is appropriate for the Commission to enter an order which will require Atlantic to offer a less attractive program to its dealers and will deprive many dealers of the distribution facilities that are vital to their TBA business. Is it logical for the Commission, having preserved TBA distribution by Atlantic, to outlaw the best method of accomplishing that distribution? ¹⁷

In discussing Atlantic's argument that the first four paragraphs of the order (those that outlaw sales commission) are illogical, the Commission mentioned two alleged differences which it said justify prohibition of the sales commission method of distribution while permitting purchase-resale to stand (126 *et seq.*). These two differences are:

1. Under sales commission, the Commission said, Goodyear supply points have a competitive advantage.

2. According to the Commission, small tire companies cannot offer extensive distribution facilities, and therefore are at a disadvantage in competing with Goodyear for Atlantic's business.

In the last analysis, it is upon these two points that the Commission rests its case. Yet, as will be shown below, these points will not support the crucial distinction which the Commission assigns them.

17. The order of an administrative body should "be adapted to the situation which calls for redress." *NLRB v. Mackay Radio & Telegraph Co.*, 304 U. S. 333, 348 (1938).

Claimed advantage to supply points. The Commission said that by reason of the business they acquire under the sales commission plan, Goodyear supply points obtain an advantage over their competitors. As indicated earlier, the Commission did not attempt to prove the relative amount of business involved. Moreover, the Commission overlooked the fact that under the purchase-resale plan, Atlantic also availed itself of supply points. Indeed, many of the Atlantic dealers who served as Atlantic supply points under purchase-resale became Goodyear supply points under sales commission.

Furthermore, the Commission assumes, without proof, that the status of supply point confers a competitive advantage. What scanty material is available in the record indicates that supply point business may well be neither attractive nor profitable. The Commission rested its order on the assumption that the status of supply point conveys a decisive competitive advantage, yet it did not produce a single Goodyear dealer who desired to be a supply point and was not afforded that opportunity.

Claimed disadvantage of small manufacturers. The Commission said that small tire companies lack distribution systems to implement sales commission plans, and are therefore unable to offer such plans to oil companies in competition with larger tire companies like Goodyear. In this concern for small tire companies, the Commission wholly ignored the competitive problems of small oil companies, and this despite the fact that the record before it was replete with the problems of just such a company. Atlantic, a company much smaller than the industry giants, found itself unable to provide under purchase-resale the extensive distribution needed by its dealers. Its distribution problems are just as deserving of consideration as those of a small tire company.

Industry's answer to the distribution problems of small tire companies and small oil companies has been to develop the two alternate distribution methods. Small oil companies

without distribution facilities can avail themselves of TBA supply points through the sales commission plan. Small tire companies without distribution facilities can avail themselves of the distribution facilities of large oil companies by purchase-resale. The Commission's argument provides no basis for distinguishing between the two methods.

Additionally, the Commission's order, while penalizing Atlantic in its competition with other oil companies, will not necessarily or even probably assist small tire companies in their competitive efforts. There is no reason to expect that Atlantic, if forced to return to purchase-resale, will do so with a small tire company. As a matter of fact, Atlantic's previous purchase-resale experience with a relatively small tire company indicates quite clearly that Atlantic would be better off, if it is forced to resume purchase-resale, to choose as its supplier a nationally known company with wide consumer acceptance.

D. May the Commission Outlaw All Sales Commission Contracts on the Basis of the Competitive Effects of a Particular Contract Between the Individual Respondents?

The scope of the order should be reviewed in the light of the grounds advanced by the Commission to support it. The order purports to be founded upon an analysis of the competitive effects of a particular sales commission contract between a particular oil company (Atlantic) and a particular TBA supplier (Goodyear). However, the Commission makes no effort, and on this record none could be made, to show that the facts it recites about Atlantic and Goodyear are applicable to oil companies generally or to TBA suppliers generally.¹⁸ Many of them, by their very nature, must be unique to the respondents in this proceeding. Nevertheless, the order outlaws all sales commission plans.

18. The Commission was careful to state that its order was based solely on the record in this case and did not include consideration of the companion cases (130).

The only precedent cited by the Court of Appeals in upholding the scope of the order is this Court's decision in *Federal Trade Commission v. Ruberoid Co.*, 343 U. S. 470 (1952), which says that the Commission is not limited to prohibiting illegal practices in the precise form in which they are found to have existed in the past, but must be allowed to close all roads to the prohibited goal so that its order may not be bypassed with impunity. In this case the Commission has far exceeded its authority under *Ruberoid*. The order not only prevents bypass by the same parties under substantially the same circumstances, it outlaws the practice for all parties under all circumstances and without regard to the presence or absence of the competitive factors which the Commission, itself, said were decisive.

II. The Decisions Below Are in Conflict With Decisions of This Court.

A. In Contravention of the White Motor Decision, the Court of Appeals Affirmed the Commission's Creation of a New Category of Per Se Violation Without Considering the Business Justifications Involved.

The Commission's order, taken with its orders in Firestone-Shell and Goodrich-Texas, creates, in practical effect, a new category of *per se* violation—sales commission plans in the oil industry.

Per se violations are those which "because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific Ry. v. United States*, 356 U. S. 1, 5 (1958). Under this Court's decision in *White Motor Co. v. United States*, 372 U. S. 253 (1963), no practice not previously examined by this Court should be outlawed *per se* without a full examination of the busi-

ness purposes advanced in justification thereof, to see whether a conclusive presumption is warranted. Neither the Commission nor the Court of Appeals addressed itself to this question. They were content to recite the supposed anticompetitive effects of the Atlantic-Goodyear sales commission contract. They made no examination of the business purposes advanced in its support, which are briefly outlined below.

In the first place, it should be noted that neither the Commission nor the Court disputed the legitimate interest that an oil company has in the marketing of TBA through its dealers. The Court of Appeals found that:

"TBA is an integral part of service station operations. Dealers must carry it in order to give complete service to motorists and to operate their stations at a profit. There are a large number of TBA items available to dealers, and there are constant changes and production developments in TBA of which the dealers must be trained and kept informed. Every major oil company offers some kind of TBA program to give training and advice to its service station dealers" (*infra*, 7a).

The primary reason for Atlantic's change from purchase-resale to sales commission was to assure that every dealer, no matter how small or remote, would have a convenient source of supply for TBA. Obviously, this benefits the dealer. It also benefits the public. When a motorist burns out a headlight on a country road, he wants a replacement tonight, not tomorrow. Under purchase-resale Atlantic was unable to fill this need. Under sales commission it was in a better position to do so.

The plan is ancillary to Atlantic's primary business. Its object is not to exploit TBA—Atlantic's commissions scarcely pay the cost of the program—but to stimulate the

sale of gasoline.¹⁹ The motorists who are the ultimate market for Atlantic gasoline cannot be expected to patronize Atlantic stations unless the stations are in a position to meet all the motorists' needs—and promptly.

The sales commission plan also benefits Atlantic in its competition with other oil companies. Atlantic is not a giant in the industry, but a comparatively small regional company. Because it lacks the resources for a distribution network of its own, Atlantic must resort to the sales commission plan to meet the competition of the majors. In the oil industry, sales commission plans are typically the competitive weapon of the lesser lights.

Under this Court's decision in *White Motor*, these facts should not have been ignored.

B. In Contravention of the *Chenery* Decisions, the Court of Appeals Invoked a New Ground for Affirming the Commission.

The Court of Appeals affirmed the Commission, not on the basis that the Commission's analysis of competitive effects was legally sufficient, but rather on the basis that the sales commission plan is inherently a tying arrangement. This is flatly contrary to this Court's holdings in *SEC v. Chenery Corporation*, 318 U. S. 80 (1943), 332 U. S. 194 (1947), that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency.

In the instant proceeding the Court of Appeals said that when the Commission analyzed the sales commission

19. This distinguishes the case from a tying contract. It is not legitimate for a manufacturer to exact a profit from the sale of an unwanted product as a condition of selling the desired product. It is quite legitimate for Atlantic to offer an ancillary service (at no profit) in order to increase its sales of its principal product. It is all the more legitimate when the arrangement benefits every Atlantic dealer, since all of them have a mutual interest in promoting sales of Atlantic gasoline.

plan, it "found, in effect, a tying arrangement inherently anticompetitive" (*infra*, 17a). But, as shown above, the Commission (absent coercion) made no such finding. The heart of the Commission's legal theory is this paragraph from its opinion:

"But we do not rest our decision on a mechanical application of the rule of the *Northern Pacific* and *Osborn* cases. The issue here is the legality of respondents' use of a *particular method* of distributing TBA products. Atlantic has sufficient economic power with respect to its wholesale and retail petroleum distributors to cause them to purchase substantial quantities of sponsored TBA even without the use of overt coercive tactics or of written or oral tying agreements, and this power is a fact existing independently of the particular method of distributing or sponsoring TBA used by Atlantic. Determination of illegality in this context requires an evaluation of competitive effects resulting from the sales commission method of distributing TBA used by these respondents." (124)

The Commission is not saying that the sales commission plan is a tying arrangement, and it is not saying that the sales commission plan is inherently anticompetitive. Instead, it is explicitly recognizing that any power Atlantic may have is independent of the method of distribution used; and that the method selected is only illegal if an evaluation of competitive effects proves it so.

The battleground chosen by the Commission was competitive effects. Under *Chenery*, the Court of Appeals may not choose another.

CONCLUSION.

For the foregoing reasons, it is submitted that this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 13339 AND 13340

SEPTEMBER TERM, 1963 JANUARY SESSION, 1964

THE GOODYEAR TIRE & RUBBER
COMPANY,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

THE ATLANTIC REFINING COMPANY,
Petitioner,

v.

FEDERAL TRADE COMMISSION;
Respondent.

Petitions to Review
and Set Aside Or-
der of the Federal
Trade Commission.

April 24, 1964

Before SCHNACKENBERG, CASTLE, and SWYGERT, *Circuit Judges.*

SWYGERT, *Circuit Judge.* The Goodyear Tire & Rubber Company and the Atlantic Refining Company request a review of the Federal Trade Commission order based upon

a complaint charging a violation of section 5 of the Federal Trade Commission Act¹ and which challenged the legality of distribution of tires, batteries, and automobile accessories (TBA) to service stations under a sales commission agreement between petitioners.

Goodyear is an Ohio corporation engaged in the manufacture, sale, and distribution of rubber products, including tires and inner tubes. It is the largest manufacturer of these products in the United States.

Atlantic, a Pennsylvania corporation, is a major producer, refiner, and distributor of gasoline and other petroleum products. It markets its products in seventeen states along the eastern seaboard.

The complaint issued by the Commission alleged that Atlantic produces and sells petroleum in commerce to wholesale distributors, automobile service stations, and others; that the distributors and retailers, ostensibly independent, nevertheless, are under the domination and control of Atlantic; that Goodyear and Atlantic entered into a sales commission contract whereby Atlantic agreed to promote the sale of Goodyear products, that is, tires, batteries, and accessories (TBA), to Atlantic's distributors and service station dealers located in a part of Atlantic's sales territory; that Atlantic had a similar contract with Firestone Tire & Rubber Company for the balance of Atlantic's territory; and that Goodyear had similar contracts with a number of other oil companies which, like Atlantic, dominate and control their distributors and service station dealers. The complaint further alleged that Atlantic is paid a sales commission by Goodyear and Firestone on their products which are sold by Atlantic's distributors and service station dealers. The complaint charged that

¹ Federal Trade Commission Act § 5(a)(1), 66 Stat. 632 (1952), 15 U.S.C. § 45(a)(1) (1958), reads as follows:

Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce are declared unlawful.

by the use of the sales commission agreement and the practices of the two companies thereunder, Atlantic and Goodyear have restrained competition in the sale of TBA, and committed unfair acts and practices proscribed by section 5 of the Federal Trade Commission Act.

The hearing examiner dismissed the complaint against Goodyear, upholding the legality of the sales commission contract, but found that Atlantic had violated section 5 of the act by forcing a substantial number of its dealers to purchase Goodyear TBA. The examiner's order against Atlantic prohibited future actions of coercion.

Both Atlantic and general counsel for the Commission appealed from the examiner's ruling. The Commission sustained the examiner's finding that Atlantic had coerced its dealers to purchase sponsored TBA but held that the coercion was symptomatic of a more fundamental restraint of trade, inherent in the sales commission plan itself. The Commission said that the principal issue raised by the complaint was the legality of the Goodyear-Atlantic contract. It noted, however, that Atlantic had a similar agreement with Firestone and that Goodyear had like agreements with a number of oil companies other than Atlantic.

The Commission determined that the sales commission method of marketing TBA is "a classic example of the use of economic power in one market (here, gasoline distribution) to destroy competition in another market (TBA distribution)." It found that Atlantic, which sells gasoline, has used its economic power over its dealers to cause them to carry substantial amounts of a different product, TBA; also, that the effects of the sales commission system are anticompetitive at the manufacturing, wholesale, and retail levels. It found that Goodyear's manufacturing competitors have been substantially precluded from selling TBA to the Atlantic service stations assigned to Goodyear; that wholesalers of TBA have also been substantially precluded from selling to Atlantic's service stations;

that Goodyear wholesalers who are not supply points have been similarly restricted; and that Atlantic service station dealers have been restrained in marketing nonsponsored TBA. Finally, the Commission found that the public has suffered because lack of competition among the service stations' suppliers of TBA has precluded the possibility of price reductions to the consumer.

The Commission based these conclusions on the components of the sales commission system which include advance notice to Goodyear and Firestone of the selection of new dealers by Atlantic, training schools for Atlantic dealers in which Goodyear and Firestone TBA are used in demonstrations, sales solicitation by Atlantic salesmen of sponsored TBA from dealers, double teaming, use of a reporting technique whereby the tire company reports to Atlantic the TBA purchases of each dealer, Atlantic's recommendation to each dealer of a minimum Goodyear or Firestone TBA inventory, and Atlantic's assistance in advertising, and providing credit card facilities for the sale of sponsored TBA.

Upon finding the sales commission system an unfair method of competition, the Commission revised and expanded the examiner's order. The order of the Commission not only prohibits Atlantic from coercing its distributors and dealers to purchase a particular brand of TBA but also forbids its participation in any sales commission arrangement for the distribution of TBA. Further, the order prohibits Goodyear's participation in any sales commission arrangement with Atlantic or any other oil company for marketing its TBA.

Upon a consideration of the record as a whole, we conclude there was substantial evidence to support the Commission's ultimate findings and conclusions and that its order should be affirmed in all respects.

To narrate all relevant facts would extend our discussion unduly; we undertake a summary.

Atlantic's Operations.

Atlantic has three major kinds of customers: wholesale distributors, retailers, and commercial accounts; the last class was not involved in the administrative proceeding.

Wholesale distributors maintain their own storage facilities and resell Atlantic's products under its brand names to their retail customers, including service stations. In 1956 there were 236 Atlantic distributors selling to 2,897 service stations.

Retail dealers who purchase directly from Atlantic are of two classes: lessee-dealers, that is, service station operators who do not own their stations; and contract dealers, station operators who own their stations or lease from parties other than Atlantic, or operate garages, grocery stores, and similar establishments. The company had 5,537 direct retail dealers in 1956. Lessee-dealers accounted for approximately thirty-nine per cent of Atlantic's total gasoline sales in 1955 and the contract dealers eighteen per cent.

The usual lease between Atlantic and its lessee-dealers provides for a one year term with automatic renewal from year to year unless written notice is given before the expiration of any term. When the lease is executed the dealer is required to sign an "Eleven Point Lease Letter" which prescribes operational standards for the service station. These include housekeeping, use and upkeep, display, illumination, personnel, hours of operation, services, adequate inventory, sales promotion, prices, and accounting. The standards are enforced by Atlantic through the surveillance of its sales personnel and so-called "phantom customer inspectors."

The Commission found that the eleven point letter is an integral part of the lease; that Atlantic at its option may terminate the lease in the event of its breach; and further, if a dealer violates any of the requirements of the letter, he is warned that the lease will be cancelled unless the noncompliance is remedied within fifteen days.

Atlantic adopted a policy in 1953 providing that any lessee-dealer who establishes a two year record of satisfactory operation is eligible for a three year lease. Moreover, Atlantic after 1953 no longer required its dealers to purchase Atlantic products except lubricants. The record shows, however, Atlantic's dealers handle its products exclusively.

In 1956 fifty per cent of the 3,044 Atlantic contract dealers operated service stations; the others operated grocery stores, garages, and similar outlets (outlets other than service stations ordinarily do not handle TBA).

Although contract dealers do not lease their stations from Atlantic, they usually enter into two kinds of agreements with the company, one providing for loans of station equipment and the other for the purchase of a minimum amount of gasoline. The loan agreements for equipment provide that Atlantic will install but the dealer must maintain the equipment (gasoline pumps, storage tanks, signs, compressors, etc.). The agreements ordinarily are for a one year term but may be terminated by notice of either party at the end of the original or any subsequent term. Atlantic may repossess its equipment upon termination of the contract; however, if the agreement is cancelled because of a breach by the dealer, Atlantic requires him to pay both the cost of installation and removal of the equipment or Atlantic has the option to leave the equipment and require him to pay for it.

Atlantic makes the same type of contract with its wholesale distributors for the purchase of gasoline as required of its contract dealers. The company, moreover, reserves the right to change the service stations' source of supply from Atlantic itself to its distributors.

Goodyear's Operations.

Goodyear has tire factories in five states. It also has fifty-seven warehouses from which its tires and the accessories it markets are distributed to wholesale and retail

outlets. The batteries which Goodyear sells are distributed directly by the companies manufacturing them.

Goodyear operates approximately 500 company owned wholesale-retail stores throughout the United States. It also has more than 12,000 independent franchised dealers as well as a number of unfranchised dealers; both sell at wholesale and retail.

TBA.

TBA is an integral part of service station operations. Dealers must carry it in order to give complete service to motorists and to operate their stations at a profit. There are a large number of TBA items available to dealers, and there are constant changes and production developments in TBA of which the dealers must be trained and kept informed. Every major oil company offers some kind of TBA program to give training and advice to its service station dealers.

Atlantic's Purchase-Resale Plan.

For a number of years before Atlantic entered into sales commission contracts with Goodyear and Firestone, it merchandised TBA under a plan known as "purchase-resale."

Under this plan the oil company sells to its dealers at wholesale TBA products which it has purchased and warehoused. The products are merchandised either under the labels of various manufacturers or under the oil company's own labels. Atlantic under its purchase-resale plan bought Lee tires from the Lee Tire and Rubber Corporation, Exide batteries from the Electric Storage Battery Company, and various accessories from other suppliers, and sold these products to its wholesale distributors and retail dealers. Between 1948 and 1950 Atlantic's sales of TBA to its distributors and dealers amounted to \$22,000,000.

Atlantic became increasingly dissatisfied with the purchase-resale plan. It asserts that outside of the Phila-

delphia area the ready availability of Lee tires diminished and it could not give a good delivery on batteries or keep them properly charged. It asserts further, that its warehouses were unsuited for handling accessories, and it was difficult to maintain an adequate supply of TBA to meet the demands of its dealers.

In 1948 and 1949 Atlantic conducted a survey of its dealers to determine their preferences of brands, sources of supply, and other aspects of TBA marketing. Sixty-seven per cent of the dealers interviewed preferred Lee tires and seventy-nine per cent preferred Exide batteries over competing brands. Only eleven per cent preferred carrying Goodyear tires and four per cent Firestone. A majority preferred to purchase their TBA from more than one source because of price advantage and variety of brands. Nevertheless, Atlantic, after conducting experiments under sales commission arrangements with both Firestone and Goodyear, entered into sales commission contracts with these companies, effective March 1, 1951, covering its entire marketing area and assigning a portion of its sales territory to each company.

While negotiating the Goodyear and Firestone contracts, Atlantic asked certain battery manufacturers whether they would offer a program similar to that of Goodyear or Firestone. Several manufacturers indicated an interest. However, both Goodyear and Firestone said they would refuse to sell only tires under the sales commission plan and insisted that they be allowed to handle batteries and accessories as well as their own products.

In order to effect the transition to the new plan, Atlantic held numerous meetings with its dealers at which its own representatives and those of Goodyear or Firestone explained the new program. The dealers were told that the plan was a change in company policy; that Atlantic wanted them to carry Goodyear or Firestone TBA rather than Lee tires and Exide batteries and that the switch would be to the dealers' benefit. Letters were also sent to the

dealers advising them of the availability of the new TBA program and urging them to take advantage of it. A Goodyear representative commented on the arrangement with Atlantic, "After years of courtship Atlantic and Goodyear have wed," and "We welcome wholeheartedly this merger."

To commence the plan, Atlantic gave Goodyear and Firestone the names of its dealers in their respective territories so that their advertising could be installed at the service stations. Under Atlantic's policy this meant that only Goodyear or Firestone identifications were to be displayed at Atlantic stations. Atlantic salesmen accompanied either by Goodyear or Firestone salesmen contacted the dealers concerning the change-over to sponsored TBA, and Atlantic received progress reports from Goodyear and Firestone. The reports included the names of dealers who refused to permit the installation of Goodyear or Firestone signs.

Within nine months after the sales commission system was inaugurated, Lee and Exide lost seventy-five per cent of their Atlantic sales notwithstanding the dealers' previous indication of a preference for these products. By October, 1951 ninety-seven per cent of Atlantic's New England region dealers and ninety-six per cent of its New York region dealers had signed with Goodyear. Firestone also signed virtually all the Atlantic dealers in its territory.

The Sales Commission System.

The sales commission contract between Goodyear and Atlantic and the contract between Firestone and Atlantic are similar. Under the contracts, Atlantic assigned to Goodyear its New England, New York, and Philadelphia-New Jersey marketing regions and to Firestone its eastern Pennsylvania, western Pennsylvania, and southern regions.

By the terms of the Goodyear contract, Atlantic receives a commission on all Goodyear TBA sold to Atlantic

dealers in the territory assigned to Goodyear in return for Atlantic's efforts and cooperation in promoting the sale of Goodyear TBA to those dealers. Atlantic's contractual assistance to Goodyear includes continuous efforts, suggestions, and counseling its dealers that they maintain adequate Goodyear stock, joint calls with Goodyear salesmen upon the dealers, and the institution of a dealer TBA training program.

An important part of the Goodyear contract is the assignment of each Atlantic dealer to a specific supply point designated by the tire company. The supply point is a TBA wholesaler who may be a Goodyear company operated store, a franchised Goodyear dealer, or an Atlantic service station dealer or distributor who at the same time is a franchised Goodyear wholesaler. Atlantic receives ten per cent commission² on all purchases of Goodyear TBA made by its retail dealers from the tire company's supply points and seven and one-half per cent on purchases by Atlantic's wholesale distributors.

When Atlantic selects a new retail dealer, at least three separate interviews are held with the applicant at which the sales commission program with Goodyear is explained. The dealer is told that most Atlantic stations in the Goodyear territory are identified "Goodyear" and that it would be to his advantage to carry that company's products. When an applicant is selected but before he is given a lease, he attends an Atlantic training school where extensive discussions and demonstrations of Goodyear TBA are conducted. Atlantic's sponsorship of Goodyear TBA is explained. The prospective dealer is told what Goodyear inventory he should carry and that he should use approved Goodyear signs, decals, and advertising mats. Goodyear is advised of the opening of the applicant's station, and the

² Although termed a sales commission contract, the payments to Atlantic are not commissions on sales made by it but are override payments on sales made by Goodyear supply points to Atlantic's dealers.

new dealer is informed of the Goodyear supply point to which he has been assigned.

Atlantic establishes TBA quotas for its dealers which are considered "an agreed upon obtainable objective." Goodyear reports to Atlantic the monthly purchases of its products by each Atlantic dealer. This procedure enables the oil company to check on the dealers' progress in selling sponsored TBA and also serves as an accounting method for ascertaining the sales upon which Goodyear pays Atlantic its commission.

Atlantic salesmen police the dealers' contractual obligations with the oil company by contacting the dealers regularly. It is the salesman who makes the initial recommendation whether a dealer's lease or contract is to be renewed. Atlantic salesmen not only promote the sale of their own company's products but also Goodyear TBA; they help plan sponsored TBA promotions, they write up TBA orders, and they check the dealer's books to ascertain whether nonsponsored TBA has been purchased.

Under the sales commission system, the dealers are visited regularly by a Goodyear salesman accompanied by an Atlantic salesman. Goodyear considers "double teaming" an effective means of selling its TBA. This duality of sales effort is continued at dealer meetings by the presence of representatives of the tire company and the oil company.

Atlantic reserves control over the advertising and identification that may be displayed at its service stations. Its policy is that only sponsored TBA identification should be displayed. Moreover, Atlantic credit cards include TBA. From 1951 to 1953 the credit card facility was limited in Goodyear territory to Goodyear TBA.

The Supreme Court in *F. T. C. v. Cement Institute*, 333 U. S. 683, 693 (1948), indicated that the Federal Trade Commission Act grants "the Commission and the courts . . . adequate powers to hit at every trade practice then existing or thereafter contained, which restrained competition or might lead to such restraint if not stopped in

its incipient stages." The Commission has a latitude of flexibility within which it can restrain any new unfair method of competition "which the ingenuity of competitors may devise."³

Unfair methods of competition proscribed by section 5 of the Federal Trade Commission Act cannot be classified rigidly into categories of business methods that stifle competition. Labeling at times is more harmful than helpful in formulating conceptions that correspond with reality.

Although petitioners contest the view of the general counsel that the Commission grounded its order on the existence of an illegal tying arrangement, the Commission found that the sales commission system is, *in effect*, such an arrangement. It went on to explain, however, that because of the peculiar features of the system, it did not rest its decision on a "mechanical application of the rule of the *Northern Pacific* and *Osborn* cases."⁴ The Commission said:

The issue here is the legality of respondents' use of a *particular method* of distributing TBA products. Atlantic has sufficient economic power with respect to its wholesale and retail petroleum distributors to cause them to purchase substantial quantities of sponsored TBA even without the use of overt coercive tactics or of written or oral tying agreements, and this power is a fact existing independently of the particular method of distributing or sponsoring TBA used by Atlantic. Determination of illegality in this context requires an evaluation of competitive effects resulting from the sales commission method of distributing TBA used by these respondents.

The heart of this case is the economic power Atlantic possesses over its service station dealers. Ostensibly, they

³ S. Rep. No. 597, 63d Cong., 2d Sess. 13 (1914).

⁴ *Northern Pac. Ry. v. United States*, 356 U. S. 1 (1958); *Osborn v. Sinclair Refining Co.*, 286 F. 2d 832 (4th Cir. 1960).

are independent businessmen; but behind the legalistic facade of independence, there exists a servitude caused by the coercive pressures which Atlantic exerts upon its dealers. The keystone of the actual relationship between Atlantic and its dealers is the lease and the equipment loan contract with their short term and cancellation provisions. Without repeating all the components of the relationship, it is evident that the service station dealer is more of an economic serf than a businessman free to purchase the TBA of his choice. We believe the Commission, in evaluating the evidence, correctly found that if a dealer wishes to continue in good standing with the company and retain his lease or contract, it is advantageous that he carry sponsored TBA.

On the issue of coercion the examiner said:

It is clear from the record in this proceeding that the Atlantic dealers did not consider the nonforcing letter as giving to them free and unhampered authority and the blessing of Atlantic to handle whatever TBA they might see fit. Both the dealers and the Atlantic salesmen accepted this letter for what it said; namely, that the dealer at the time of the change-over and prospective dealers thereafter had the right to select or reject the TBA sales program offered by Atlantic. The prospective dealer making application for an Atlantic station would not likely reject offhand the program submitted by Atlantic, and such rejection could very well affect his selection as an Atlantic dealer. After a dealer selected a TBA program, the Atlantic salesmen insisted, and saw to it, that the dealer hewed to the line, insofar as the more important items of TBA were concerned. The salesman would be expected to insist upon the purchase of sponsored TBA, as such purchases were reflected in the commission which the salesman received.

He concluded that "coercion and pressure were used [by Atlantic] on a substantial number of dealers to induce them to purchase sponsored TBA and to discontinue the purchase or display of nonsponsored items."

The Commission affirmed the examiner's finding of coercion. It said that although the proclaimed policy of Atlantic has been to permit its dealers to carry whatever TBA they choose, the policy in practice is ignored and the dealers "have been orally advised by sales officials of the oil company that their continued status as Atlantic dealers and lessees will be in jeopardy if they do not purchase sufficient quantities of sponsored TBA."

The Commission referred in particular to witnesses representing suppliers competing with Goodyear and Firestone who testified that the dealers responded negatively to their sales efforts because the dealers felt they were required to purchase sponsored TBA. There was evidence that if the dealers purchased nonsponsored TBA, they were told by Atlantic to return it or, in any event, not to display it. There was also testimony that leases had been cancelled or allowed to terminate because dealers had purchased nonsponsored TBA.

Atlantic contends that the finding of coercion is not supported by substantial evidence. It says that the finding rests on the testimony of only thirteen dealers out of more than five thousand; that these isolated instances of "unauthorized" coercion are insufficient to establish a violation of Atlantic's "free choice policy." We disagree. The evidence relating to overt coercive tactics, although not extensive, must be considered with the testimony of the witnesses representing competing suppliers to the effect that the dealers felt that if they did not carry sponsored TBA they risked reprisal. Also to be considered are the policing tactics of Atlantic's salesmen and the surveillance by the so-called phantom customer inspectors. Moreover, it should be noted that the examiner, in considering the testimony of the dealers who testified for Atlantic, recog-

nized that these witnesses "were under considerable pressure because they were naturally interested in not jeopardizing the renewal of their leases."

Atlantic's contention that sporadic reprisals against dealers are an insufficient basis for finding coercion is answered in *United States v. Loew's Inc.*, 371 U. S. 38, 50 (1962). There, the Court said:

Appellants . . . make the . . . argument that each of them was found to have entered into such a small number of illegal contracts as to make it improper to enter injunctive relief. . . . We disagree. Illegality having been properly found, appellants cannot now complain that its incidence was too scattered to warrant injunctive relief.

Atlantic's power to cause its dealers to carry either Goodyear or Firestone TBA does not depend upon overt coercive methods. The totality of facts surrounding the relationship between the oil company and the dealers points to one conclusion: the oil company is able to exert sufficient economic power over its dealers so that for all practical purposes they are required to carry sponsored TBA.

Atlantic says that its influence over its dealers to purchase sponsored TBA short of force, threat, or intimidation is lawful; that it may recommend high quality TBA to its dealers; and that such action serves as a legitimate business purpose in the promotion of the sale of gasoline. This would be a persuasive argument except for the dealers' economic dependency upon the oil company. In that setting, recommendation is tantamount to command. Covert practices are as efficient as overt action. Sophisticated methods of pressuring the dealers into carrying sponsored TBA are as effectual as express covenants and open threats.

Osborn v. Sinclair Refining Co., 286 F. 2d 832 (4th Cir. 1960), although a private suit under the antitrust laws, dealt with a sales commission contract similar to the one before us. Osborn, a dealer, charged that his lease was

cancelled because he had not purchased sufficient quantities of Goodyear TBA. The court of appeals held that an illegal "arrangement or condition," a tie-in, existed between the oil company and its dealers which permitted the plaintiff to recover. Although the court was not specifically concerned with the legality of the Goodyear-Sinclair sales commission contract, it held that, "the Goodyear TBA was tied to the lease and the sale of the gasoline." Chief Judge Sobeloff characterized the arrangement thus:

The perniciousness of the imposed tie-in is aggravated by the fact that the defendant [Sinclair] is not even in the business of selling the tied products, but is employing its economic power in the gasoline industry to force his dealers to do business with a supplier in another industry under an arrangement that yields the defendant an extraneous revenue. The defendant in this case goes a step further than the supplier in the usual tie-in case, for here the tied product is not even handled or sold by the defendant, but it farms out to another, for a price, its coercive economic power.

We think this an apt characterization of the Goodyear-Atlantic sales commission system.

It is true that Goodyear's contract with Atlantic in itself has no tying features. Only when the contract is considered contextually with the oil company-dealer relationship and the economic power that Atlantic has over its dealers does its tying feature emerge. Manifestly, the system was designed to exploit Atlantic's created and controlled service station market. The Commission properly, we think, decided that the system integrates Atlantic's economic power over its service station market into the Goodyear TBA distribution system, thus giving Goodyear, for a price, a captive market.

As pointed out in *McElhenney Co. v. Western Auto Supply Co.*, 269 F. 2d 332 (4th Cir. 1959), an illegal understanding (such as a tying arrangement) may be implied

from a course of dealing between the parties. Here, the tying arrangement is the sales commission system operated by Goodyear and Atlantic. In its narrower aspects the system is a tying arrangement because it requires the buyer of one product, the service station dealer who purchases Atlantic gasoline, to buy another line of merchandise, Goodyear TBA. Surrender by the dealer of his freedom to choose between brands of TBA is *per se* illegal if a "not insubstantial" amount of interstate commerce is affected. *Northern Pac. Ry. v. United States*, 356 U. S. 1 (1958); *International Salt Co. v. United States*, 332 U. S. 392 (1947).

Appraising the broader aspects of the system as a tying arrangement, we think the Commission correctly determined that the system injures competition in the distribution of TBA at the manufacturing, wholesale, and retail levels. Interbrand competition for the Atlantic service station TBA market is foreclosed to Firestone in Goodyear's territory and Goodyear is foreclosed from selling to the service stations in Firestone's territory. Moreover, the record substantiates the Commission's finding that suppliers of TBA competing with Goodyear and Firestone are substantially foreclosed from selling their products to Atlantic dealers. Atlantic's service station market is fenced off so as to make it unavailable to both manufacturers and wholesalers of competing brands.

Intrabrand competition is perniciously affected. Restraint results inevitably from the designation of a single supply point for TBA sales to the Atlantic dealer. Other Goodyear wholesalers cannot compete with the supply point dealer for the business of the Atlantic service stations in his territory.⁵

We are convinced that the Commission correctly analyzed the sales commission system and found, in effect, a tying arrangement inherently anticompetitive. It is anti-

⁵ Of the 1,155 independent Goodyear dealers in Atlantic's marketing area, only 128 were acting as supply points for Atlantic service stations.

competitive largely because competition for the business of the individual service station is replaced by competition for the oil company's domination of its dealers.

The Commission found that service stations constitute a large and necessary market for TBA and evaluated the Goodyear-Atlantic sales commission system in relation to Atlantic's seventeen-state service station TBA market. Atlantic has nearly seven thousand service stations in this territory. As of 1955 Goodyear had signed TBA contracts with 2,183 of the 2,248 Atlantic service stations in the eight-state territory assigned it. As of 1955 Firestone had signed virtually all the 4,698 Atlantic stations in the ten-state area assigned it. Goodyear's TBA sales to Atlantic dealers rose from approximately two and one-half million dollars in 1951 to more than five and one-half million dollars in 1955. Firestone's sales to Atlantic dealers increased from \$3,243,350 in 1951 to \$5,562,936 in 1955. Total Goodyear and Firestone sales under the Atlantic contracts from June, 1950 to June, 1956 was more than \$52,000,000. Atlantic's stations constitute 3.4 per cent of the total number of service stations in the United States and it sells 2.5 per cent of the gasoline sold in the nation.

We believe the foregoing facts adequately demonstrate that a substantial amount of commerce has been affected by Atlantic's contracts with Goodyear and Firestone. These facts also demonstrate that Atlantic has sufficient economic power in the gasoline market to restrain a substantial amount of commerce in the service station TBA market within the territory serviced by Atlantic. Therefore, the Goodyear-Atlantic sales commission system is within the "substantiality of economic effect on commerce" test defined in *Northern Pac. Ry. v. United States*, *supra*, and *Standard Oil Co. v. United States*, 337 U. S. 293 (1949). Cf. *Osborn v. Sinclair Refining Co.*, *supra*.

Goodyear contends that the provision in the Commission's order prohibiting it from entering into sales commission contracts with any oil company is not supported by substantial evidence. Atlantic makes a similar contention that the order is too broad because it prohibits the oil

company's participation in a sales commission arrangement with any TBA supplier.

We think the Supreme Court answered petitioners' contentions in *F. T. C. v. Ruberoid Co.*, 343 U. S. 470, 473 (1952), when it said:

Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future. In carrying out this function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity.

Petitioners' contention that the Commission's findings are inadequate and do not meet the requirements of section 8 of the Administrative Procedure Act, 5 U. S. C. §1007(b), is without merit.

Moreover, we are not persuaded by Atlantic's contention that the hearing examiner, in making his decision, considered evidence outside the record since he heard a similar complaint filed against Firestone and Shell Oil Company; nor are we persuaded by Goodyear's contention that the finding of the violation against it is based on evidence admitted against Atlantic but struck as to Goodyear. While the examiner received evidence concerning both the Firestone-Atlantic and the Firestone-Shell sales commission contracts, we are satisfied that the findings of both the examiner and the Commission were based on proper and sufficient evidence and that there was no denial of procedural due process.

The Commission's order is affirmed and will be enforced.

Order

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.
Chicago, Illinois, 60610

Friday, April 24, 1964.

Before

HON. ELMER J. SCHNACKENBERG, *Circuit Judge.*

HON. LATHAM CASTLE, *Circuit Judge.*

HON. LUTHER M. SWYGERT, *Circuit Judge.*

Nos. 13339, 13340.

THE GOODYEAR TIRE & RUBBER COMPANY,	} Petitions for review of an order of the Federal Trade Com- mission.
THE ATLANTIC REFINING COMPANY, <i>Petitioners.</i>	
<i>v.</i>	
FEDERAL TRADE COMMISSION, <i>Respondent.</i>	

This cause came on to be heard on the petitions for review of an order of the Federal Trade Commission and the transcript of the record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is ordered by this Court that the order entered in this cause by the Federal Trade Commission on March 9, 1961, be, and the same is hereby **AFFIRMED**, and the order will be enforced, in accordance with the opinion of this Court filed this day. Upon presentation an appropriate decree will be entered.

APPENDIX C.

**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.**

THE ATLANTIC REFINING COMPANY,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

No. 13340.

**FINAL DECREE AFFIRMING AND ENFORCING
ORDER TO CEASE AND DESIST.**

The Atlantic Refining Company, a corporation, petitioner herein, having filed in this Court on May 10, 1961, a petition to review and set aside an order to cease and desist issued against it on March 9, 1961, by the Federal Trade Commission, respondent herein, in a proceeding before it entitled "In the Matter of The Goodyear Tire & Rubber Company, a corporation, and The Atlantic Refining Company, a corporation, Docket No. 6486;" and a copy of said petition having been served upon respondent; and the respondent having thereafter certified and filed in this Court a transcript of the entire record in said proceeding; and the matter having been heard by this Court on briefs and oral argument on January 9, 1964, and this Court having rendered its decision on April 24, 1964:

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the prayer of the aforesaid petition to set aside the order of the Federal Trade Commission as to the petitioner herein be, and it hereby is, denied;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the order to cease and desist of the Federal Trade Commission be, and it hereby is, affirmed, and that petitioner be, and it hereby is, commanded forthwith to obey said order and to comply therewith.

By THE COURT:

ELMER J. SCHNACKENBERG,
Elmer J. Schnackenberg,
Circuit Judge.

LATHAM CASTLE,
Latham Castle,
Circuit Judge.

LUTHER M. SWYGERT,
Luther M. Swygert,
Circuit Judge.

Entered: May 20, 1964.

A True Copy:

Teste:

KENNETH J. CARRICK,
*Clerk of the United States
Court of Appeals for
the Seventh Circuit.*